No. 208.
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SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1901.

No. 208

FREDERICK WILLIAMS,
Petitioner

against

GEORGE C. GAYLORD, CHARLES E. MADDRILL AND DWIGHT T. ROLFE

BRIEF FOR PETITIONER IN REPLY

C. WALTER ARTZ,
Of Counsel

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CHARLES E. MADDRILL
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The brief for the respondents filed in this cause appears to make appropriate the following suggestions:

I.

AS TO MATTERS OF FACT.

THE COURT SHOULD NOT BE MISLED BY THE SOMEWHAT INCOMPLETE STATEMENT MADE ON PAGE 1 OF RESPONDENTS' BRIEF, TO THE EFFECT THAT THE GOLD HILL MINING COMPANY WAS ORGANIZED FOR THE PURPOSE, AMONG OTHERS, OF "PURCHASING, OPERATING, MANAGING AND WORKING MINES IN THE STATE OF CALIFORNIA."

Upon this statement the implication might arise that so far as the purpose of the incorporation of the Mining Company was the purchasing etc, of mines, it

was to be limited to the State of California. Such an implication is, however, defeated by the following words in the charter, succeeding the foregoing quotation without intervening punctuation: "and elsewhere, to work the same," etc.

Record, p. 105.

It is quite clear from the language employed in the charter that the Mining Company had full power to purchase and operate mines elsewhere, although it was to have a branch office at Nevada City, California, near the mines which it was first to acquire.

Record, p. 106.

The effort which appears to be made to induce the assumption that the Mining Company was organized for the purpose of carrying on mining operations exclusively in California must, we think, therefore, fail of foundation on the facts.

II.

AS TO MATTERS OF LAW.

1. THE EARNEST EFFORT TO DISTINGUISH THE REASONING OF THIS COURT IN THE CASE OF ST. LOUIS, &c., R. R. Co. v. TERRE HAUTE, &c., R. R. Co., 145 U. S 393, (AT 403) MUST ALSO FAIL.

Counsel are in error in his assertion that the Court rested its decision that the Illinois statute there referred to could be availed of by stockholders alone upon a prior and exclusively controlling decision of the Supreme Court of Illinois. The Court upon the other hand cited in support of its decision the cases of Zabriskie v. Cleveland, &c., Railroad, 23 How. 381, 398; Central Transportation Co. v. Pullman's Car Co.,

139 U. S. 24, 42, 60; Davis v. Old Colony Railroad, 131 Mass. 258, 260; Beecher v. Marquette and Pacific Co., 45 Mich. 103; and last of all, Thomas v. Citizens' Railway, 104 Illinois, 462, *which did not refer to the same statute*, but to a statute of the character of that under consideration in the case at bar requiring a two-thirds consent of stockholders as necessary to the validity of a mortgage by a railroad corporation. Clearly this Illinois case was not cited as exclusive authority, but merely as one of a number of decisions on the general law of corporate relations.

Counsel, moreover, in the ardor of their contention that the portion of the opinion in the case of St. Louis, &c., R. R. Co. v. Terre Haute R. R. Co., *supra*, to which we have referred, was not part of the decision, and in their warm protest that this Court should not be "committed" to a decision or rule of law which it has not deliberately and directly recognized, have apparently overlooked the recent case of Louisville, &c., Ry. Co. v. Louisville Trust Co., 174 U. S. 552, (cited in our main brief, p. 67), in which the Court, speaking through the same member (Mr. Justice GRAY) says, at p. 572:

"In *St. Louis, Vandalia & Terre Haute Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S. 393, one of the parties relied on a provision of a statute of Illinois that it should not be lawful for any railroad company of Illinois, or its directors, to consolidate its road with any railroad out of the State, to lease its road to any railroad company out of the State, or to lease any railroad out of the State without having first obtained the written consent of all the stockholders of said roads residing in the State of Illinois, and any contract for such consolidation or lease which may be

made without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be null and void.' *Of that statute this Court said:* 'It did not limit the scope of the power conferred upon the corporation by law, an excess of which could not be ratified or be made good by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time, or otherwise, to deny.' 145 U. S. 403."

These statements appear, therefore, to have furnished a rule of decision for this Court in a case subsequently arising, and it is idle to argue upon the assumption that the ruling is not established law, but merely a succession of *dicta*, in nowise binding.

In this regard and to correct the misapprehension under which counsel seem to labor in their effort to distinguish the case mentioned from that now before the Court, it may be of some value to state that the questions in the *Terre Haute case* were these:

It was insisted that the contract in question was void as to the plaintiff under the Illinois act requiring the assent of stockholders, and was also void as to both plaintiff (the Illinois corporation), and defendant (the Indiana corporation), as *ultra vires.*

The Court took up the Illinois statute first and *passed upon it*, holding as matter of general law that non-compliance with that statute rendered the contract voidable only. Then passing to the question of *ultra vires*, a decision was reached to the effect that the Indiana corporation had *certainly* acted beyond its corporate powers, whatever might be said in that regard of the Illinois company.

It would seem to follow that the Court intended to and did in fact *dispose* of the effect of statutes of the nature there considered, upon contracts entered into without a compliance with their requirements, even if the final determination of the case might have been reached without considering that question, but by only deciding that the Indiana corporation had exceeded its powers.

2. IT BY NO MEANS FOLLOWS THAT JUDGMENT CREDITORS MAY RAISE THE QUESTION BECAUSE THE STATE COURT HELD THAT THE CONSENT OF THE STOCKHOLDERS WAS NECESSARY TO THE AUTHORIZATION BY THE DIRECTORS OF INSTRUMENTS UNDER THE ACT OF 1880.

The contention of counsel that the deduction that judgment creditors could take advantage of non-compliance with the terms of the Act of 1880, "followed as a corollary" (brief, p. 21) from the ruling of the Supreme Court of California, that the instrument then before the court could not be made without the consent of the stockholders, needs only the answer that no other court has ever perceived the existence of this "corollary" or "essential and necessary result flowing from" what counsel, by similar reasoning, is pleased to term "the void character of the contract." Upon the contrary, the courts have everywhere held the opposite view, and held it as matter of general law.

3. COUNSEL'S ELABORATE ATTEMPT TO DRAW A DISTINCTION BETWEEN THE USE OF THE WORDS "VOID" AND "UNLAWFUL" IN STATUTES OF THE GENERAL NATURE UNDER DISCUSSION LEADS MERELY TO CONFUSION AND ABSURDITY.

They would have the Court take the view that while the stronger word "void," or the words "null and void," mean *voidable*, the weaker word "unlawful" should be held to mean, as counsel express it, "absolutely void;" *i. e.*, because the stronger expression has the weaker significance, the weaker expression should have the meaning indicated by the stronger one. This of course is clearly a *non sequitur;* and although reliance is placed upon the case of Holder v. Aultman, Miller & Co., 169 U. S. 81, for support, examination of that case will clearly show that the distinction claimed exists only in the mind of counsel.

It was held in that case at the suit of a foreign manufacturing company against its agent for proceeds of goods sold in the State, that where a statute invalidated contracts "made in this State," a contract not complete until approved in another State was not within the statute. The Court distinguished such a case from one where the legislative intent was to prevent the transaction of business in the State by a foreign corporation under circumstances prohibited, no matter where the contract might have been made. No distinction was made between the words "void" and "unlawful," such as counsel's argument might lead one to expect.

Upon the other hand, counsel again overlooking the full force and effect of the case of St. Louis, etc. R. R. Co. v. Terre Haute, etc. R. R. Co., *supra*, evidently failed to notice that the Statute of Illinois in question provided that "it shall not be *lawful*" for the performance of the acts therein mentioned without the consent

of the stockholders, and also, that in the event of failure to obtain such consent, the contracts or leases made should be "null and void." This Court particularly considered the words last quoted, and determined the effect of the statute without any direct reference to the words "it shall not be lawful;" and certainly this result could not have been obtained had the Court recognized in the words "it shall not be lawful" any such value as claimed by the learned counsel for respondents. Having held the lease voidable under the words "null and void," no attention was paid to the weaker expression in the statute.

4. THE CASES CITED BY RESPONDENTS' COUNSEL DEFINING THE RELATION OF STATE COURT DECISIONS TO THOSE OF THE FEDERAL COURTS ARE NOT MATERIAL.

A considerable number of cases additional to those heretofore noticed on the application for *certiorari* and referred to in our main brief (page 34), are cited by counsel for the respondents in support of their claim that the decision of the Supreme Court of California that judgment creditors may raise the questions contemplated by the Act of 1880, are controlling here. These cases are open to the same criticism as those which we have heretofore discussed.

They either involve a clear and undeniable construction of a State statute, the determination of a local rule of property or a question essentially and exclusively local, whether relating to a right or remedy granted or limited, or the validity of form and subsequent legal effect of an instrument *as such* under the statute under consideration and its com-

pliance with the recording acts. They are therefore without bearing upon the present inquiry.

It is equally clear we think, that cases involving the enforcement of contracts made without compliance with the statutes restraining foreign corporations from carrying on business within the State, unless certain conditions be complied with either before the commencement of that business or while it is being carried on, are not pertinent to the case at bar. They involve the performance of a local duty to the public consisting of acts to be done in the particular State and do not in anywise relate to the internal management or affairs of such corporations.

We may add that counsel's suggestion (brief, p. 49) that the bondholders should have intervened in this suit in order to make pertinent a discussion of their attitude, is clearly without force under the well known doctrine of equity, to the effect that the trustee stands for his beneficiaries, and has full power to enforce their rights. If the trustee acts in good faith and is otherwise competent, they have no place as intervenors in any suit between him and third parties relating to the trust estate. This is a doctrine particularly well known and continually applied in the foreclosure of railroad and other corporate mortgages.

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